[illegible] UNITED STATES

[illegible] Term, 198[illegible]

[illegible] RAILROAD COMPANY; UNION PA[illegible] [illegible] COMPANY; MISSOURI PACIFIC RAILROAD [illegible]ANY; THE ATCHISON, TOPEKA AND SANTA FE [illegible]AY COMPANY; BALTIMORE AND OHIO RAILROAD [illegible]ANY; BALTIMORE AND OHIO CHICAGO TERMINAL [illegible]; CHESAPEAKE AND OHIO RAILWAY COMPANY; [illegible] CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) withdraw jurisdiction from the Federal Courts to enjoin a rail union engaged in a lawful strike from peacefully picketing railroads which are neutral to the dispute?

2. Do the Railway Labor Act (45 U.S.C. § 151, *et seq.*) and Section 20 of the Clayton Anti-Trust Act (29 U.S.C. § 52), as reasserted by the Norris-LaGuardia Act, immunize peaceful secondary picketing by a rail labor organization from being "violations of any law of the United States"?

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BRIEF FOR RESPONDENTS

Respondents Brotherhood of Maintenance of Way Employes ("BMWE") and several of its officers respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern R.R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986).

STATUTES INVOLVED

Respondents respectfully submit that this case involves the proper interpretation of Sections 4 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113, as reasserting Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, and whether those Acts are to be accommodated to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*[1]

COUNTERSTATEMENT OF THE CASE

The Maine Central Railroad ("MEC") and Portland Terminal Company ("PT") are the primary rail carriers in the state of Maine, while the MEC also operates in New Hampshire and Vermont. PT is a wholly-owned subsidiary of MEC and MEC, in turn, is a subsidiary of Guilford Transportation Industries, Inc. After acquiring control of the MEC and PT in June 1981, Guilford obtained approval from the Interstate Commerce Commission in 1982 to acquire control over the Boston and Maine Corporation ("B&M")[2] and, later in that same year, it obtained Commission approval to acquire control over the Delaware & Hudson Railway Company ("D&H").[3] By early 1984, Guilford had exercised the authority

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[1] Respondents have reproduced as Appendix A to this Brief Section 20 of the Clayton Act and Sections 4 and 13 of the Norris-LaGuardia Act; Appendix B hereto is a side-by-side comparison of the second paragraph of Section 20 of the Clayton Act with Section 4 of the Norris-LaGuardia Act.

[2] *Guilford Transportation Industries, Inc.—Control—B&M*, 366 I.C.C. 292 (1982).

[3] *Guilford Transportation Industries, Inc.—Control—D&H*, 366 I.C.C. 396 (1982)

of J. R. Davis at Ex. A. Independently of the first approach, respondent BMWE began to picket carriers which connected with the Guilford system (*e.g.*, *Richmond, Fredericksburg & Potomac R.R. v. BMWE* [hereinafter, "*RF&P* case"], 795 F.2d 1161 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-503) and planned for the picketing of strategic locations through which Guilford's traffic flowed, such as Chicago. J.A. at 52-53, 54-55. Contrary to petitioners' statements in their brief (Pet. Brief at 19), respondent BMWE neither asked, nor gave petitioners an option to boycott Guilford in exchange for freedom from picketing. *See*, J.A. at 38-39, 52-53.

A. Petitioners' Responses To The BMWE's Threatened Picketing

Petitioner BN was the first carrier to respond to respondent BMWE's threat to picket mutual aid carriers and on April 9, 1986, it filed a complaint in the United States District Court for the Northern District of Illinois against the Brotherhood and several of its officers; on that same day it obtained an *ex parte* restraining order enjoining respondents from picketing or striking. J. A. at 1. Encouraged by the BN's success in comparison with their own lack of success before the district court in the District of Columbia, petitioners Missouri Pacific Railroad ("MP") and Union Pacific Railroad ("UP") filed a new complaint against respondents in Chicago on April 10 and requested a restraining order.[7]

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tution of the United States to engage in secondary picketing. *BMWE v. Association of American Railroads, et al.*, D.D.C. Civil Action No. 86-0951. Sixty-two railroads, including all petitioners but the Burlington Northern ("BN") filed a separate action against respondent on April 9 (*Alton & Southern Ry. v. BMWE*, D.D.C. Civil Action No. 96-0977) and sought a restraining order to prohibit respondent from engaging in such picketing. That restraining order was denied without prejudice on April 10, 1986, and the non-BN petitioners thereafter filed three separate actions against respondent in the Northern District of Illinois on April 10 and 11, 1986. *See*, *BMWE v. BN*, Sup. Ct. No. 85-1852, Pet. at 5-8.

[7] Petitioner UP filed a notice of dismissal from *Alton & Southern Ry. v. BMWE*, *supra* note 6, on April 11, 1986, under Rule 41(a),

They were joined by the Atchison, Topeka & Santa Fe Railway ("ATSF") which also filed a new complaint on April 10.[8] The district court orally granted both requests for restraining orders on April 10.[9] When the MP/UP and ATSF returned to court on April 11 to iron out the terms of their restraining orders, they were accompanied by four CSX System railroads[10] which had filed a new Complaint earlier that morning after having filed notices of voluntary dismissals in the *Alton & Southern* case.[11] An April 11, the district court issued three separate restraining orders against picketing or strikes by the Brotherhood.

All four cases were assigned to the same judge and respondent asked that the cases be transferred to the district court which was hearing the *Alton & Southern* case. J.A. at 2. That motion was denied, and on April 21, 1986, the court conducted a hearing on petitioners' requests for preliminary injunctions. During the hearing, the court was presented with stipulations and evidence showing that each of the four rail systems involved provided traffic to and received traffic from the Guilford

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Fed. R. Civ. P., several hours before respondent BMWE served its answer. Petitioner MP did not file a similar notice of dismissal even though it had requested that such a notice be filed.

[8] Petitioner ATSF also filed a timely voluntary notice of dismissal from the *Alton & Southern* action on April 11.

[9] Due to an error in communications, respondent BMWE's pickets in Los Angeles were not informed of the oral orders until after they began to picket the UP yard. J.A. at 49. That yard was picketed because respondent believed, apparently mistakenly, that UP supervisors were on Guilford lines. *Id.*

[10] Those railroads are the Chessie system railroads: Baltimore & Ohio Railroad ("B&O"), Baltimore & Ohio Chicago Terminal Company; and Chesapeake & Ohio Railway ("C&O"), as well as CSX Transportation, Inc. which is, as of July 1, 1986, the new name for Seaboard System Railroad, Inc.

[11] The Joint Appendix in this case shows that the Chessie and CSX complaint was filed on April 10, 1986. J.A. at 1. That is in error as is the notation that a restraining order was issued in that case on April 10.

rail system, including the MEC and PT.[12] Three of the rail systems (BN, UP/MP and ATSF) did not connect with the Guilford rail system, but they, along with the CSX system, operated into Chicago, Illinois, which is an important gateway for the Guilford system. J.A. at 40, 54. Respondent BMWE informed the district court that it intended to picket the rail carriers in Chicago, which in the Brotherhood's opinion, would then interrupt the flow of traffic into and from the Guilford system, in order to place economic pressure on Guilford to force MEC and PT back to the bargaining table. J.A. at 43.

Unlike the other petitioners, the Chessie railroads connect with the Guilford rail system at three points —Buffalo, New York; Philadelphia, Pennsylvania; and Alexandria, Virginia. J.A. at 7. Those interchanges, however, are with the D&H. Besides providing significant amounts of traffic for the Guilford system (*see*, note 12, *supra*), the Chessie system exercised its discretion since the strike to provide other forms of assistance to the primary disputants' rail system. In March 1986, the Chessie system permitted the D&H to modify an interchange agreement so as to permit D&H supervisors, instead of Chessie operating employees, to interchange traffic at Buffalo. J.A. at 25-27. This modification prevented Chessie system employees from confronting the BMWE's pickets. *Id.* On April 6, 1986, the Chessie system provided five locomotives to the D&H to move approximately 100 cars from the Chessie's yard in Philadelphia into the Guilford system because the D&H was unable to move those cars itself. J.A. at 17-19, 28-29. Besides doing struck work, this act gave the Guilford

[12] The BN moved 1,400 cars in 1985 that were destined to or received from MEC and PT; the UP/MP system handled 601 cars destined for or received from MEC/PT in 1985; the ATSF handled 248 cars during that same year (Pet. App. at 34a-35a). The Chessie system received over $14 million in revenue from traffic routed to or from the Guilford system which involved over 25,000 rail cars (J.A. at 5); CSX Transportation derived over $5.4 million in 1985 from similar traffic movements with three of Guilford carriers, not including the B&M. J.A. at 37.

system five badly needed engines; some of those locomotives remained on the Guilford system until mid-April. J.A. at 18. Finally, the Chessie system continued to allow the D&H to use Chessie engines on run-through trains which passed through Buffalo until after the union sought to picket the Chessie system. J.A. at 16, 31. This lending of engines also relieved the strain which the lack of service-worthy engines created for the Guilford system. J.A. at 42.

B. Ruling Of Courts Of Appeals

On April 23, 1986, the district court issued a lengthy opinion granting petitioners' requests for a preliminary injunction, and respondents took an expedited appeal to the Seventh Circuit. On June 4, 1986, that court issued a decision reversing the district court and remanding with instructions to dismiss the complaints for want of jurisdiction. As the Seventh Circuit summarized (Pet. App. at 2a):

> The railroads defend the injunction on the principal ground that Congress could not have meant railroads, alone among America's principal industries, to be exposed to secondary picketing. We conclude, however, that Congress provided just this. Employees of railroads are not covered by the National Labor Relations Act, which prohibits secondary picketing and allows the National Labor Relations Board to seek injunctions. . . . The Railway Labor Act . . . does not prohibit secondary pressures, and this dispute therefore is governed by the Norris-LaGuardia Act, . . . which forbids courts to enjoin peaceful picketing growing out of labor disputes.

Respondents respectfully submit that the court of appeals' decision in this case is eminently correct and we ask this Court to affirm that decision.[13]

[13] Respondents have been authorized to state that the Railway Labor Executives' Association, a voluntary unincorporated association of the Chief Executive Officers of the nineteen standard labor organizations which collectively represent virtually all organized rail employees in this country, agrees with and supports respondents' position.

SUMMARY OF ARGUMENTS

Ignoring the constitutional foundations upon which peaceful secondary picketing rests, petitioners and *amici* argue that the federal courts have jurisdiction to, and should, enjoin that conduct. But when petitioners' and *amici*'s arguments are reduced of their rhetoric, their sole support lies in *Ashley, Drew & Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir. 1980), and in their belief that Congress could never have intended that the rail industry alone be subject to secondary pressure. However, all five Circuit Courts of Appeals (*see*, note 22, *infra*) which have addressed both or part of these issues during this recent strike have concluded that secondary pressure is indeed available to rail unions and may not be enjoined. Respondents respectfully submit that these decisions are clearly correct.

1. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, specifically provides that: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from" picketing and urging others to withhold their labor. If the terms of that Act are applied literally, it clearly deprives the federal courts of jurisdiction to enjoin peaceful picketing by BMWE of petitioners in this case—*i.e.*, a case "involving or growing out of a labor dispute." However, petitioners seek to avoid a literal application of Section 4 by arguing that an implied limitation must be read into Section 4 which restricts its application in railroad situations to cases where the labor organization shows that the target of the picketing is "substantially aligned" with the carrier with which it has the primary dispute. That restrictive construction of the Act is contrary to its plain language, its ex-

pressed intent and numerous decisions by this Court which have held consistently that the Norris-LaGuardia Act is to be applied literally and broadly. *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702 (1982); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960); *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

2. Petitioners' arguments that the Norris-LaGuardia Act must be accommodated to the Railway Labor Act are without merit. First, it is improper to accommodate the policies of the Norris-LaGuardia Act to vague commands which are without substantive standards and which, if accepted, will allow federal courts to define what forms of peaceful self-help are permissible in a rail labor dispute where the right to self-help clearly exists. And second, respondent BMWE's conduct does not violate the Railway Labor Act, for that labor statute does not prohibit peaceful picketing, whether characterized as primary or secondary. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Secondary picketing in a pure Railway Labor Act dispute, respondent BMWE submits, is unregulated protected activity which does not violate any law of the United States. *Accord, Golden State Transit Corp. v. City of Los Angeles*, 89 L.Ed.2d 616 (1986); *United States v. Hutcheson*, 312 U.S. 291 (1941).

ARGUMENTS

I. Section 4 of the Norris-LaGuardia Act Withdraws Jurisdiction From The Federal Courts To Enjoin Respondents From Engaging In Peaceful Picketing Of Petitioners, For These Cases Clearly Involve And Grow Out Of A Labor Dispute With Other Railroads

Notwithstanding the clear intent of Congress in enacting both Section 20 of the Clayton Act, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to prohibit federal courts from being used as arbiters to decide which forms of self-help are permissible in labor

disputes, petitioners and *amici* urge this Court to adopt a construction of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which does just that for rail and airline labor disputes. While the district court considered itself competent to undertake that task, the court of appeals disagreed, concluding that Congress had deprived the federal courts of jurisdiction to enjoin conduct enumerated in Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, even in rail labor disputes. Respondents respectfully submit that the court of appeals was correct, for its decision is in keeping with and, we submit, compelled by the language of the Norris-LaGuardia Act, by its legislative history, and by the oft repeated admonitions of this Court that this Act must be applied literally and broadly—*i.e.*, there are no implied exceptions in that Act for rail labor disputes. *E.g., Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702, 712 (1982); *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 335-36 (1960).

A. The Plain Language Of The Norris-LaGuardia Act Provides That The Federal Courts Do Not Have Jurisdiction To Enjoin the BMWE From Picketing Petitioners

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Moreover, where the language chosen by Congress "admits of no exception[,]" it is error for a court to legislate such an exception by judicial construction. *TVA v. Hill*, 437 U.S. 153, 173 (1978). When those principles are applied to the Norris-LaGuardia Act, it is indisputable both that the plain and common meaning of the terms employed by Congress in that Act, and in particular in Section 4, provide that the federal courts do not have jurisdiction to enjoin the picketing which has been threatened in this case, and that it is error to read an exception into that unambiguous language for rail labor disputes.

Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides the overall theme of the Act and states that:

> [N]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 2 of the Act, 29 U.S.C. § 102, sets forth that public policy and provides that the courts should look to that policy "[i]n the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited . . . ." Included in that public policy was Congress' declaration that to give individual workers "full freedom of association" and to protect employees' rights to bargain collectively, it was necessary that employees not be restrained in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 102. In other words, the Norris-LaGuardia Act was intended to be a form of labor's bill of rights and to protect labor's power in the delicate balance between the uncontrolled power of management and labor to further their respective interests. *See, Golden State Transit Corp. v. City of Los Angeles*, 89 L.Ed.2d 616 (1986).

To implement that policy, Congress then undertook to correct many of the abuses of the past, the primary one being federal court injunctions which restrained forms of self-help which Congress had declared to be proper. To correct that particular abuse, Congress included in Section 4 of the Act specifically enumerated types of union activities that were to be protected from restraint. *United States v. Hutcheson*, 312 U.S. 219, 236-37 (1941). Section 4, as relevant to this case, accomplished that purpose by providing (29 U.S.C. § 104):

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; . . . [and]

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

In order to avoid any ambiguity over the scope of the terms used throughout the Act and, in particular, in the first paragraph of Section 4, which the courts could use to limit that scope by "whittl[ing] away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes" (S. Rpt. No. 163, 72d Cong., 1st Sess. at 25 (1932)), Congress included as Section 13 of the Act, 29 U.S.C. § 113, definitions of the terms "involving or growing out of a labor dispute" (§ 13(a)), "persons participating or interested in such dispute" (§ 13(b)), and "labor dispute" (§ 13(c)).

As pertinent here, Congress defined the term "labor dispute" as follows: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). That term obviously includes the dispute between the BMWE and MEC/PT.

Further, Congress provided in Section 13(a) that: "A case shall be held to involve or to grow out of a labor

dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein . . . ." 29 U.S.C. § 113(a). The plain language and ordinary meaning of Section 13(a) clearly covers this case, for it is beyond question that petitioners and the rail employees working for them are persons engaged in the same industry as MEC/PT and MEC/PT employees who are represented by the Brotherhood. Moreover, it should be beyond question that the Brotherhood's intent to picket "involves or grows out of" its labor dispute with MEC and PT, for the record does not contain even the slightest suggestion that the union would expend the time and effort to picket petitioners or, more importantly, would ask the rail employees involved to incur the suffering which such picketing entails, except in the aid of a fair and just resolution of its labor dispute with MEC and PT. Indeed, petitioners have not asserted that the BMWE's conduct has been motivated by a concern unconnected to its labor dispute with MEC and PT; rather, petitioners are merely asserting that the BMWE's actions will be ineffectual in accomplishing their purpose because they are not "substantially aligned" with MEC and PT.

As shown above, when the plain language of Section 4 is applied to this case, it should be beyond question that this proceeding and the activities at issue "involve or grow out of a labor dispute" within the plain meaning of the Norris-LaGuardia Act. And since the actions at issue—*i.e.*, peaceful picketing—are comprised solely of conduct specifically enumerated in subsections (e) and (i) of Section 4 (*i.e.*, giving publicity to the existence of a labor dispute by patrolling to urge others to withhold their labor) and are designed to ask rail employees to perform the acts specified in subsection (a) of that section (*i.e.*, withholding of labor), it must be concluded that Section 4 of that Act is applicable to this case. As this Court stated in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980): "The language of the

statute is clear, and we have historically assumed that Congress intended what it enacted."

Notwithstanding the clear import of the language Congress used in the Norris-LaGuardia Act, and in particular in Sections 4 and 13, to express its commands, petitioners nevertheless assert that Congress did not intend that language to immunize the picketing of railroads which are not substantially aligned with the primary disputant in a rail labor dispute. In other words, according to petitioners, the Norris-LaGuardia Act was not intended to apply to secondary picketing in the rail industry. *See*, note 21, *infra*. Respondents BMWE, *et al.*, disagree, for the Act's legislative history clearly shows that petitioners' contention is without merit.

B. The Legislative History Shows That Congress Intended To, And Did, Immunize Secondary Picketing By Rail Unions From Federal Court Injunctions

Contrary to petitioners' and *amici*'s beliefs, the Norris-LaGuardia Act is not an aberration which was unimportant when enacted and which is even less binding today. Rather, the legislative history of that Act shows that it was enacted by Congress to establish in clear, unmistakable and enforceable terms the right of labor to use certain, specifically enumerated forms of self-help as proper concerted economic pressure for their mutual aid and protection. That Act, as this Court has explained, did far more than simply remove the fetters which federal court injunctions had placed on labor's right to exert concerted economic pressure; rather:

> The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act [38 Stat. 730 (1914)] by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 [of the Clayton Act, 29 U.S.C. § 52] removes all such allowable conduct from the taint of being a "violation of any law of the United States," . . . .

United States v. Hutcheson, *supra*, 312 U.S. at 236. In other words, Congress established by the Norris-LaGuardia Act the type and scope of union activities which it declared were to be unregulated forms of concerted activity which were not to be considered as a violation of any federal law. As both the history and background of the Act demonstrate, Congress contemplated union secondary self-help activity when it enacted the Norris-LaGuardia Act, and it considered such activity to be a legitimate economic weapon which was to be protected by that Act.

(i) *Secondary Activity And The Clayton Act*

At the turn of the century, state and federal courts were divided over how to deal with activity by a labor organization which was directed against a "neutral" employer and intended to bring economic or other pressure to bear on the "primary" employer involved in a dispute. In so far as the states were concerned, such secondary pressure was condemned in Massachusetts, for example, but permitted in New York. *See*, F. Frankfurter and N. Greene, THE LABOR INJUNCTION 42-45 (MacMillan, 1930) [hereinafter, "*The Labor Injunction*"].[14]

This conflict also arose in the federal courts, especially in rail cases, because those courts were frequently used by employers to enjoin strikes. *See*, G. Eggert, RAILROAD LABOR DISPUTES, 108-35 (Univ. of Michigan Press 1968). With the enactment of the Sherman Antitrust Act, "[p]assed primarily as a safeguard against the social and economic consequences of massed capital" (*The Labor Injunction* at 8), employers and the federal courts were given a new weapon to wield against labor. *See*, Id. at 8-9. The use of the antitrust law to enjoin labor activity

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[14] New York law provided prior to 1920 that "[a] strike or threat to strike may be brought to bear upon neutrals, provided that neutrals thus used as a lever are within the same industry as those in whose coercion the union is primarily interested." *The Labor Injunction* at 45.

was affirmed by the Supreme Court in a secondary activity case, *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the "*Danbury Hatters* Case"), where the union employed "unfair" lists and "the primary and secondary boycott" in its effort to unionize the employees of hat manufacturers. *Id.* at 305-08.

This use of injunctions by federal courts to prevent peaceful picketing in labor disputes was condemned by many and, in 1914, Congress decided to define for the federal courts the proper scope of self-help. It did this by enacting the second paragraph of Section 20 of the Clayton Anti-Trust Act,[15] which, as the House Report on this portion of the legislation provided, was

> concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules.

H. Rpt. No. 627, 63d Cong., 2d Sess. at 30 (1914), appending H. Rpt. No. 612, 62d Cong., 2d Sess. (1912). Section 20 of the Clayton Act, the result of this legislative effort, provided in pertinent part that:

> . . . [N]o . . . restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or *from ceasing to perform any work or labor*, or *from recommending, advising, or persuading others by peaceful means so to do*; or from attending *at any place* where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or *from peacefully persuading any person to work or to abstain from working . . .; nor shall any of the acts*

[15] Pub. L. No. 212, 38 Stat. 730, 738 (1914), codified as 29 U.S.C. § 52.

> *specified in this paragraph be considered or held to be violations of any law of the United States.*

29 U.S.C. § 52 (emphasis added).

Disregarding the clear intent of the labor provisions of the Clayton Act, petitioners assert that "secondary boycotts" were uniformally condemned by 1926. Pet. Brief at 20. That assertion, respondents submit, is incorrect and misleading. First, there was very little consensus of opinion as to what in fact was a "secondary boycott." *See*, 51 Cong. Rec. 9658, col. 2 (1914) (Remarks of Reps. Volstead and Maher). And second, while there appeared to be by 1914 a recognition that a pure secondary boycott—*i.e.*, pressuring a neutral not to patronize a primary disputant—may be beyond the pale of permissible self-help, it was also recognized that such action, in many instances, could not be divorced from labor's rights, which all acknowledged existed, to refuse to perform any labor and to ask others to refuse to perform labor. As Senator Hughes stated during the floor debates on the Clayton Act of 1914:

> When you come to legislate against a secondary boycott you must legislate against a sympathetic strike, and that is the reason why I want to clear it up if I can. Men, in my opinion, have a right to strike; they have a right to institute a sympathetic strike; an unreasonable strike; or a strike for any reason or for no reason.

51 Cong. Rec. 13923, col. 2 (1914) (Remarks of Sen. Hughes). Senator Hughes' remarks were echoed by the other Senators who were debating the wisdom of enacting the labor provisions of the Clayton Act, including Section 20. *Id.* (Remarks of Sens. Borah and Cummins.)

Ignoring the impact of the Clayton Act, petitioners' assert that cases such as *Toledo, Ann Arbor & North Michigan Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893), and *United States v. Debs*, 64 Fed. 724 (N.D. ILL. 1894), *pet. for writ of habeas corpus denied*,

158 U.S. 564 (1895), represented the state of the law in Congress' view in 1926. That assertion is incorrect. First, the continued validity of those cases was questioned by the minority report to what became Section 20 of the Clayton Act, when those Congressmen opined that, if accepted, the bill would prohibit the injunctions which was issued in the *Toledo* case against the boycott of Toledo & Ann Arbor cars by non-Toledo & Ann Arbor employees, and which underlyed the *Debs* case which arose from the boycott of Pullman cars by rail employees. H. Rpt. No. 627, 63d Cong., 2d Sess., Part 2, at 20-21 (1914), appending Minority Report to H. Rpt. No. 612, 62d Cong., 2d Sess. (1912). When the House version of the bill was introduced in the Senate, Sen. Ashurst, one of its supporters, explained the need for this legislation and stated:

> In order that I may not be deemed to have overshot myself and allowed an intemperate or imprudent statement to escape my lips on this subject, I will insert in the RECORD at this point a few samples calling attention to some of the harsh and unreasonable decisions of the courts on this subject [*i.e.*, injunctions against laboring men].
>
> Labor Decisions and Injunctions
>
> Refusing to haul cars a conspiracy (T.A. & N.M. Ry v. Pennsylvania Co., 54 Fed. Rep., 730, Apr. 3, 1893). . . .
>
> A boycott is an unlawful conspiracy (Thomas V. C., N.O.&T.P. Ry. Co., 62 Fed. Rep., 803) . . . .

51 Cong. Rec. 13664 (1914) (Remarks of Sen. Ashurst).[16]

A second reason why the *Toledo* and *Debs* case ceased to be good law as of 1914 is that the last clause of Sec-

[16] *See also*, colloquy between Sens. Hughes, White, Cummins and Borah on validity of Pullman boycott under bill, in which all agreed that a concerted refusal to work, even for a neutral, should not be enjoined. 51 Cong. Rec. 13922-23 (1914).

tion 20[17] expressly overruled the use of statutes such as the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to support a finding that the enumerated forms of self-help were unlawful. *See*, 51 Cong. Rec. 9653, col. 1 (1914) (Remarks of Rep. Webb).[18] The House bill was amended as Representative Webb proposed and provided that the acts specified in the section shall not be "considered or held unlawful." At first the Senate proposed to limit that clause to violations of the anti-trust laws. S. Rpt. No. 698, 63d Cong., 2d Sess. at 51 (1914). But, when the bill was considered on the Senate floor, the Senate Judiciary Committee agreed to delete the words "anti-trust laws" and to insert "any law of the United States." 51 Cong. Rec. 14364 (1914) (Remarks of Sen. Culberson). When Senator Smith of Georgia asked "What is there beyond that [*i.e.*, antitrust laws] that we wish to relieve him [*i.e.*, laborer] of?" (51 Cong. Rec. 14367, col. 1), Senator Walsh replied: "I have not the cases in mind myself, and I do not recall having seen them, but I am told that there are one or two other statutes that have occasionally been appealed to by Federal courts as justification for the issuance of injunctions in these labor disputes." *Id.* The amendment then passed (*Id.*), was accepted by the Conference Committee and became the law.

Unfortunately, the will of Congress was not complied with fully, for in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), this Court held that certain secondary boycotts and picketing were not protected under

[17] That clause provides as follows: "[N]or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 29 U.S.C. § 52.

[18] Rep. Webb stated in explaining the Judiciary Committee's proposed amendment:

> [T]he committee feels that no harm can come from making those acts legal on the law side of the court, for anything that is permitted to be done in conscience [*i.e.*, equity] ought not to be made a crime or forbidden in law.

the Clayton Act because that Act applied only to injunctions sought by employers against their own employees.[19] The *Duplex* Court stressed what it perceived to be "extreme and harmful consequences" of protecting secondary activity. *See, Id.* at 477. Justice Brandeis, with whom Justices Holmes and Clarke joined, argued in a strong dissent that Congress had passed the Clayton Act precisely because of the persistent judicial practice of enjoining "picketing and persuading others to leave work" when "a judge considered [such activity] socially or economically harmful." *Id.* at 484-85 (Brandeis, J., dissenting). *See also, Bedford Cut Stone Co. v. Stone Cutters*, 274 U.S. 37 (1927).

(ii) *Secondary Pressure And The Norris-LaGuardia Act*

The *Duplex* and *Bedford* cases eventually led to the passage of the Norris-LaGuardia Act. Moreover, that Act's broad definitions in Section 13 were expressly intended to overrule the Court's limitations on secondary activities in the *Duplex* and *Bedford* cases, and to eliminate any doubt that Congress sought to remove the federal courts from defining the proper boundaries of permissible self-help in labor disputes. *See, Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 711-20. Those conclusions are inescapable from the Act's legislative history, including then Professor Frankfurter's work, *The Labor Injunction*, which urged and detailed the need for the Act.

For example, the report of the House Committee on the Judiciary, H. Rpt. No. 669, 72d Cong., 1st Sess. (1932), which reported the Bill which became the Norris-LaGuardia Act, stated that:

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[19] *Duplex* involved a strike against a Michigan manufacturer of printing presses which had refused to consent to a union shop. Other locals of the same union employed secondary pressure on the New York companies delivering, installing, and maintaining the presses. *See, Duplex*, 254 U.S. at 462-64.

> The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which Act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

Id. at 3. After noting that Section 4 of the bill enumerated "the same character of acts which Congress in section 20 of the Clayton Act . . . sought to restrict from the operation of injunctions" (*Id.* at 7-8), the Committee stated that:

> In the case of Duplex Printing Press Co. v. Deering (254 U.S. 443), decided January 3, 1921, and being a six to three decision, the court held so far as pertinent to this particular discussion that this section of the Clayton Act provided a restriction upon the use of the injunctions in favor only of the immediate disputants and that other members of the union not standing in the proximate relation of employer and employee could be enjoined. *Of course, it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants.* This is intended to be remedied by the later provision in this act defining the meaning of the term, "person participating in a labor dispute," as to whom, as in the bill defined, the courts are deprived of jurisdiction to issue injunctions in the specified instances set forth in this section.

Id. at 8 (emphasis added). Finally, as the Committee explained in describing the definitions section of the bill (*Id.* at 10):

> It is hardly necessary to discuss them other than to say that these definitions include . . . a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Co. v. Deering . . . .

The Senate Judiciary Committee's Report, S. Rpt. No. 163, *supra*, at 25, contained comparable language, and summarized the bill as follows:

> The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

See also, H. Rpt. No. 669, *supra*, at 11. As the Senate report makes clear by referring to rail labor throughout its report, rail labor was included within the class of persons entitled to invoke the protections of the Act. S. Rpt. No. 163, *supra*, at 10-12.

By consciously expanding the class of employees eligible for the protections of the Act beyond the immediate disputants, Congress legitimized "secondary activity" which is a term of art in labor law and refers to "pressure tactically directed toward a neutral employer in a labor dispute not his own." *National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612, 623 (1967) (footnote omitted). As this Court explained in the *National Woodwork* case (386 U.S. at 622-23) (footnote omitted):

> As a result of the Court's decisions limiting § 20 of the Clayton Anti-trust Act,] . . . "primary" but not "secondary" pressures were excepted from the antitrust laws . . . .
>
> In 1932 Congress enacted the Norris-LaGuardia Act and tipped the scales the other way. Its provisions "established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation." . . . Congress abolished, for purposes of labor immunity, the distinction between primary activity between the "immediate disputants" and secondary activity in which the employer disputants

> and the members of the union do not stand "in the proximate relation of employer and employee . . . ."

Thus, from the passage of the Norris-LaGuardia Act, "[i]t was widely assumed that, prior to 1947, the Norris-LaGuardia Act prevented federal courts from enjoining any 'secondary boycotts.'" *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 387 (1969).

Indeed, the courts which had passed on this question prior to 1947 had concluded that a suit to enjoin secondary picketing presented a "case involving or growing out of a labor dispute." *E.g., Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. denied*, 317 U.S. 645 (1942); *Taxi-Cab Drivers v. Yellow Cab Operating Co.*, 123 F.2d 262 (10th Cir. 1941); *see also, United States v. Hutcheson, supra*; *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942); *see generally, Amalgamated Assoc. of Street, Electric Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902, 905 (8th Cir. 1948). Consequently, it is clear that the legislative history supports and, indeed, requires a broad and literal application of the Norris-LaGuardia Act in this case.

Nevertheless, petitioners refer to portions of the congressional debates on the proposed legislation which became the Norris-LaGuardia Act (Pet. Brief at 40-42) to argue that the Act applies differently to rail labor disputes, for, petitioners assert, Congress in 1932 intended to allow injunctions to be used to remedy violations of the Railway Labor Act and to prevent the expansion of rail strikes beyond the primary disputants. Respondents BMWE, *et al.*, disagree with petitioners' reading of the legislative history, for that history clearly shows that Congress intended the Act to apply to *all* labor disputes, including rail disputes, in exactly the same manner.

Shortly before the final bill was passed by the House, Congressman Beck proposed an amendment which would

have removed rail labor disputes from Section 4 of the Act. 75 Cong. Rec. 5503, col. 2 (1932). In addressing that proposal, Congressman LaGuardia stated that there was no need for the amendment, for the Railway Labor Act gave the public all the protection it needed by providing certain bargaining obligations and procedures which were designed *to settle disputes*,[20] and that Section 8 of the proposed anti-injunction bill required a plaintiff in a suit seeking an injunction to exhaust those procedures before seeking court aid. 75 Cong. Rec. at 5504, col. 2 (Remarks of Rep. LaGuardia). As Congressman LaGuardia summarized in opposing the proposed amendment (*Id.*; emphasis added):

> So that there is the tie-up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The workers could not and would not think of going on strike *before* all the remedies provided in the law have been exhausted. . . .

Congressman Beck's amendment was defeated (75 Cong. Rec. at 5505, col. 1), and, thus, the necessary conclusion from this legislative history is that Congress clearly intended the Norris-LaGuardia Act, including Section 4, to apply to rail labor strikes. *See also*, 75 Cong. Rec. 5499, col. 2 (Remarks of Reps. Lankford and Beck). Moreover, there is not the slightest indication in the Act's legislative history that Congress believed that the bill would apply differently to rail disputes so as to limit its application to the primary disputants and not, as the bill's language provided, to any person participating or interested in the labor dispute.

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[20] When Congressman LaGuardia's remarks are considered in light of the fact that the Railway Labor Act was singularly successful in preventing strikes (*see*, pages 41-42, *infra*), it becomes clear that the Congressman meant that the Railway Labor Act provided processes which enabled rail disputes to be settled short of strikes, not that it prohibited strikes or secondary activity as petitioners argue.

C. This Court Has Specifically Rejected Narrow Interpretations Of The Norris-LaGuardia Act Which Would Both Limit The Reach Of The Act And Re-insert The Federal Courts Into The Labor Injunction Business

When it enacted the Norris-LaGuardia Act, Congress explained that its severe limitation on federal court jurisdiction was considered necessary as the only practical means "of remedying existing evils." As Congress added: "[I]n order that the limitation [of jurisdiction] may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required." H. Rpt. No. 669, *supra* at 11. Such a stated purpose requires a broad, literal reading of the Act's operative language, and this Court has emphasized many times in rail labor and other cases that such a broad reading of the Act is mandatory. For example, in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 335-36 (1960) (footnotes omitted; emphasis added), the Court stated in reference to a question as to the definition of a "labor dispute":

> Unless the literal language of this definition is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted. . . . *The hearings and committee reports reveal that Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited constructions by the courts.*

It should be noted that in the *Railroad Telegraphers* case, a railroad case, this Court gave no indication that the Act applied any differently to employees or disputes subject to the Railway Labor Act.

While the *Railroad Telegraphers* case dealt with the scope of Section 13(c) of the Act (*i.e.*, the definition of "labor disputes"), the same analysis applies in construing the scope of Section 13(a)'s definition of when a case involves or grows out a labor dispute, because in a companion case, *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960), the Court addressed the scope of Section 13(a) and reached a comparable conclusion. In *Marine Cooks*, the Court was presented with the picketing of a foreign ship manned by foreign crewmen and a threat to extend the picketing to the cargo's consignees in protest over the loss of U.S. flag jobs to foreign vessels. As the Court explained in addressing an argument that the case did not involve or grow out of a labor dispute because the ship being picketed and the cargo's consignees were not parties to the underlying dispute (362 U.S. at 370) (footnotes omitted):

> It is difficult to see how this controversy could be thought to spring from anything except one "concerning terms or conditions of employment," and hence a labor dispute within the meaning of the Norris-LaGuardia Act. The protest stated by the pickets concerned "substandard wages or substandard conditions." The controversy does involve, as the Act requires [in § 13(a)], "persons who are engaged in the same industry, trade, craft, or occupation." And it is immaterial under the Act that the unions and the ship and the consignees did not "stand in the proximate relation of employer and employee." This case clearly does grow out of a labor dispute within the meaning of the Norris-LaGuardia Act.

Respondent BMWE respectfully submits that, as in the *Marine Cooks* case, it is difficult to see how the case at bar can be thought to spring from anything else but the BMWE's dispute with MEC/PT, for the union's sole

reason for engaging in secondary picketing is to resolve its primary dispute.

Petitioners assert, however, that, notwithstanding the Act's plain language, there is an implicit requirement in the Act that its withdrawal of jurisdiction provisions do not apply to picketing against a neutral rail employer unless the union establishes that the secondary rail employer has aligned itself with the primary carrier in some substantial manner.[21] While that position is supported by *Ashley, Drew & Northern Ry. v. UTU*, 625 F.2d 1357 (8th Cir. 1980), it is contrary to this Court's subsequent decision in *Jacksonville Bulk Terminals, supra*, and to the recent decisions by the four circuit courts of appeals which have considered this issue recently.[22] Respondents BMWE, *et al.*, respectfully submit that this Court should also reject *Ashley Drew*.

In *Ashley Drew*, the Eighth Circuit, without relying upon the fact that the case before it involved a rail dispute, explained its approach to the Norris-LaGuardia Act as follows:

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[21] In labor parlance, this means that the activity is no longer "secondary." Under the National Labor Relations Act, a third-party employer who "substantially aligns" himself with the primary employer in a labor dispute loses his protected neutral status and becomes a primary employer. A union striking the primary employer is then free to picket the ally, or take whatever other action against the ally as could be taken against the primary. A classic explanation of this principle, known as the ally doctrine, is set forth in *NLRB v. Electrical Workers*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). In such a case, secondary activity is not involved for the allied employer is no longer considered a neutral to the dispute.

[22] Besides the case at bar, those decisions are: *Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *RF&P* case, *supra; Norfolk & Western Ry. v. BMWE*, 795 F.2d 1169 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-175; *D&H* case, *supra*. The Second Circuit has also considered a related question in *Conrail v. BMWE*, 792 F.2d 303 (2d Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-353.

> Most courts considering the scope of section 13(a) . . . have not relied on a literal reading. Instead, these courts have come to results in accord with the following test: when a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute.

625 F.2d at 1363. Although the Act does not contain any specific standards which can be used to define the parameters of the "economic interest" test, the Eighth Circuit looked to the Fifth Circuit's decision in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966), and concluded that:

> Under this "economic self-interest test," the subject matter of the present case—the picketing of [the second carrier]—would involve or arise out of the [primary] labor dispute if [the second carrier] were "substantially aligned" with [the primary carrier].

625 F.2d at 1364. This result was, in the *Ashley Drew* court's opinion, consistent with the Norris-LaGuardia Act, for according to the court (625 F.2d at 1366):

> [I]t is reasonable to conclude that section 13(a) was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease. . . .

Although the *Ashley Drew* "substantial alignment" test is different and far more restrictive than the Fifth Circuit's "economic self-interest" test (*compare, Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, *supra*, 362 F.2d at 654-55 (economic self-interest may be satisfied by interests of employees honoring picket lines), *with, Ashley Drew, supra*, 625 F.2d at 1363-64), both tests, respondent BMWE respectfully submits, conflict with the plain language of the Norris-LaGuardia Act (including in particular § 13(a) and (b)), Congress' intent in enacting that legislation, and this Court's interpretation of the scope of that Act.

A fundamental problem with both the "substantial alignment" and "economic self-interests" tests is that those tests require the federal courts to examine the motives for union conduct which on its face is immunized by Sections 4 and 13(a) of the Norris-LaGuardia Act to determine the "place" where the union's interest in a labor dispute ceases. However, since neither test is either directly or by implication set forth in the Act,[23] the courts are virtually free to apply their own notions of what is permissible economic activity in defining the limits of either test. Indeed, this is exactly what the district court did in this case by ignoring the union's clearly expressed reasons for engaging in secondary picketing and by concentrating solely on the degree of business relations between petitioners and the MEC and PT. *See*, Pet. App. at 36a.

Such free-wheeling judicial interference in labor disputes is contrary to the very purposes of the Norris-LaGuarida Act, for the Act's legislative history shows that Congress deliberately used broad language in the Act enumerating both the specific types and the scope of union activities which were to be immunized, in order to pre-

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[23] These standards are not provided by the Railway Labor Act or by any other federal legislation, for as explained *infra* at pages 45-46, the Railway Labor Act does not contain any standards which may be used to limit secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 391. Moreover, this Court also observed that: "The very complexity of the distinctions [between primary and secondary activity] . . ., if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task [*i.e.*, adopting the NLRA's principles on secondary activity to railway disputes] ourselves." *Id.* at 392.

vent federal courts from inquiring into the union's motivation for engaging in that conduct. *United States v. Hutcheson, supra*, 312 U.S. at 236-37. As this Court has noted before, by enacting clear "mileposts for judges to follow" (75 Cong. Rec. 4935 (1932) (remarks of Sen. Bratton)), Congress intended to prevent "one of the greatest evils associated" with labor injunctions—*i.e.*, the use of legal doctrines "which often made the lawfulness of a strike depend upon judicial views of social and economic policy." *Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 715. Both the "substantial alignment" and the "economic self-interest" tests, however, require a federal court to pass on the reasonableness of the union's secondary activity and, thus, both tests clearly "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed that Act." *Id.* at 719. As this Court observed in the *Jacksonville Bulk Terminals* case (457 U.S. at 719-20) (footnote omitted):

> The applicability not only of § 4, but also of all of the procedural protections embodied in that Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity. The Employer's interpretation [and BMWE submits, both the *Ashley Drew* and *Atlantic Coast Line* tests, are] . . . simply inconsistent with the need, expressed by Congress when it enacted the Norris-LaGuardia Act, for clear "mileposts for judges to follow." . . .

In *Jacksonville Bulk Terminals*, this Court expressly rejected the use of any test, except the Act's plain language, to determine the scope of the protections afforded by that Act. 457 U.S. at 713-20. As the Ninth Circuit explained in *Smith's Management Corp. v. IBEW*, 737 F.2d 788, 791 (9th Cir. 1984) (emphasis added), in rejecting an implied test to determine if the Norris-LaGuardia Act's protections are applicable:

> Mindful that "the term 'labor dispute' must not be narrowly construed," . . . we reject the "economic self-interest test" applied by the Fifth and Eighth Circuits and urged upon us by Smith's. We decline to adopt a rule which would exclude a secondary boycott from the anti-injunction provisions of the Norris-LaGuardia Act simply because the union is unable to establish that the secondary employer is in fact "substantially aligned" with the primary employer. *Such a rule puts the courts in the untenable position of second-guessing a union as to the effectiveness of a particular boycott in achieving a union's goals.*

737 F.2d at 791 (emphasis added). That conclusion is compelled by this Court's earlier decisions on the scope of the Act, for this Court has expressly forbidden judicial intrusions into a union's motivation. *Jacksonville Bulk Terminals, supra*, 457 U.S. at 719 n.19 and accompanying text; *United States v. Hutcheson, supra*, 312 U.S. at 232.

Petitioner's attempt to create a different rule of law in this case by asserting that the Norris-LaGuardia Act should be viewed as applying differently in rail labor disputes. Pet. Brief at 47. That argument, respondents respectfully submit, lacks any merit, for the Act's language and its legislative history are devoid of any indication that Congress intended to allow federal courts to examine the wisdom of a union's call for help in a rail labor dispute, but to forbid any such inquiry in other disputes. As the Seventh Circuit so clearly explained in this case (Pet. App. at 22a-23a):

> Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer. Will a strike at the secondary employer put "a lot" of pressure on the primary employer? If so, the union may make the call; if not, not. A court applying the "substantial alignment" test is weighing the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress

passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the courts—must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate. See *United States v. Hutcheson*, 312 U.S. at 236-37.

Respondents respectfully submit that the court of appeals was correct in concluding that this case is indeed one "involving or growing out of a labor dispute" and that petitioners are seeking to enjoin "persons participating or interested in such dispute . . . from doing, whether singly or in concert" acts specifically enumerated in Section 4 of the Norris-LaGuardia Act. Consequently, the district court was without jurisdiction to issue an injunction in the case unless there is some reason to accommodate the principles of the Norris-LaGuardia Act to another federal *labor* legislation.[24] As shown below, and as the court of appeals concluded, however, petitioners are incorrect in asserting that the Norris-LaGuardia Act must be, or should be, accommodated to the Railway Labor Act in this case.

II. Contrary To Petitioners' And *Amici*'s Assertions, Peaceful Secondary Pressure Does Not Violate Any Command Of The Railway Labor Act; Consequently, There Is No Legitimate Reason To Accommodate The Strictures Of The Railway Labor Act

Surmising that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, was intended to outlaw all forms of sec-

[24] Although petitioners initially asserted below that unlawfulness under the Interstate Commerce Act, 49 U.S.C. § 10101, justified an injunction notwithstanding the Norris-LaGuardia Act, they have apparently abandoned that argument before this Court. *But see*, Pet. Brief at 39. In view of the last clause in Section 20 of the Clayton Act and this Court's statements in *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra*, 362 U.S. at 339 n.15, the abandonment of that argument was a wise decision, because as this Court stated in the *Telegraphers'* case: "[U]nlawfulness under nonlabor legislation [does] . . . not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of federal courts . . . ." *Id.*

ondary pressure from being viewed as permissible forms of self-help in rail labor disputes, petitioners and *amici* argue that the provisions of the Norris-LaGuardia Act withdrawing federal court jurisdiction to enjoin such activity may be ignored in this case. That argument was rejected by the Seventh Circuit because, after a careful review of the Railway Labor Act, especially as construed by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the court of appeals concluded that peaceful secondary pressure is unregulated activity that is neither prohibited by the Railway Labor Act nor enjoinable notwithstanding the strictures of the Norris-LaGuardia Act. Pet. App. at 16a-17a. Respondents BMWE, *et al.*, respectfully submit that the court of appeals was correct, for an examination of the Railway Labor Act's legislative history, both in 1926 and in 1934 when it was substantially modified, shows that Congress did not intend to remove peaceful secondary pressure from the arsenal of self-help measures which are available to rail labor once the Act's major dispute resolution processes are exhausted unsuccessfully.

An examination of the Railway Labor Act itself to find an expression either banning or permitting peaceful secondary pressure is, as all parties to this case recognize, fruitless, for as this Court observed in the *Jacksonville Terminal* case, the Act is totally silent as to "what is to take place once [the Act's processes for resolving a dispute over the formation of new agreements] . . . have been exhausted without yielding resolution of the dispute." 394 U.S. at 378. To overcome this silence, petitioners and *amicus* National Railway Labor Conference ("NRLC") look to the Act's purposes, and to federal court decisions as to permissible forms of self-help around the turn of the century, to argue that all forms of economic pressure against "neutrals" are inherently banned by the Act. Respondents disagree, for as the First Circuit recently observed in rejecting a similar argument: "In the face of this legislative si-

lence [in the Railway Labor Act as to whether secondary pressure is prohibited], the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation." *D&H* case, *supra*, 803 F.2d at 1231. Indeed, as we will show below, when Congress' intent is examined, it becomes clear that petitioners' and *amicus'* surmise and speculation is wrong. Moreover, in the absence of a clear prohibition in the Act, it is improper to ignore the express language in Section 4 of the Norris-LaGuardia Act withdrawing jurisdiction to enjoin such peaceful economic pressure.

A. The Railway Labor Act Does Not Restore To The Federal Courts Jurisdiction Which The Norris-LaGuardia Act Withdrew To Enjoin Peaceful Secondary Pressure

Here, as the court of appeals concluded and as the clear language of Section 4 provides, the Norris-LaGuardia Act withdraws jurisdiction from federal courts to enjoin peaceful secondary picketing. Thus, in arguing that federal courts nevertheless have jurisdiction to enjoin such conduct in a rail labor dispute to enforce the Railway Labor Act, petitioners and *amici* in essence are asserting that Section 4 of the anti-injunction Act has been repealed by the Railway Labor Act. While the 1934 Railway Labor Act amendment legislation [25] contained in Section 8 of that Act a provision that: "All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed" (48 Stat. at 1197), neither the Norris-LaGuardia Act itself nor Section 4 thereof was designated as being repealed. Thus, if the federal courts now have jurisdiction to enjoin peaceful secondary pressure in rail disputes, it must be because the Railway Labor Act, or some other federal labor statute, has impliedly repealed Section 4 of the Norris-LaGuardia Act.

However, as this Court has noted on many occasions before, repeals by implication "are not favored" (*e.g.*,

[25] Pub. L. No. 442, 73d Cong., 2d Sess., ch. 691, 48 Stat. 1185 (1934).

Morton v. Mancari, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Moreover, federal courts "must read the statutes [which are supposedly in conflict] to give effect to each if we can do so while preserving their sense and purpose." *Id.* Those admonitions are especially applicable here where petitioners are seeking an injunction to prevent peaceful picketing as an integral part of self-help in a labor dispute where self-help is permissible, for the Norris-LaGuardia Act was enacted to prevent just such injunctions by removing the courts from the "labor injunction business."

While this Court has held before that the Norris-LaGuardia Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act, *e.g.*, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), it has emphasized that "the policy of the [Norris-LaGuardia] Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *IAM v. Street*, 367 U.S. 740, 773 (1961). Accommodating the two Acts requires both that the courts preserve "the obvious purpose in the enactment of each statute" (*Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, *supra*, 353 U.S. at 40) and that the strictures of the anti-injunction Act *not* be disregarded where an injunction would strip "labor of its primary weapon without substituting any reasonable alternative." *Id.* at 41; *compare*, *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976), *with*, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970). Finally, there must be a clear and definite obligation in the Railway Labor Act which Congress intended the courts to enforce, least the vagueness of the policy being enforced provides a "cover for free-wheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia in the first

place." *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 583 (1971).[26]

Here, both petitioners and *amicus* NRLC recognize that not all forms of pressure against non-disputant carriers are "secondary" under Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), and, thus, would be subject to being banned by their construction of the Railway Labor Act. *See*, *Amicus* Brief at 25-26. Indeed, Section 8(b)(4) does not contain a "sweeping prohibition" of secondary conduct. *Carpenters, Local 1976 v. NLRB*, 357 U.S. 93, 98 (1958). And, as this Court noted in its *Jacksonville Terminal* decision:

> No cosmic principles announce the existence of secondary conduct, condemn it as evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

394 U.S. at 386-87. Nevertheless, petitioners and *amicus* NRLC urge this Court to engage in just such an exercise in this case because, they assert, the dividing line between "primary" conduct and the conduct at issue here is so clear. While respondents disagree with petitioners' valuation of the Chessie's conduct, that disagreement is immaterial, because, as this Court noted in the *Jacksonville Terminal* case, in view of the uncertainties as to the dividing line between pure secondary conduct

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[26] Petitioners reliance on *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), to authorize an accommodation is misplaced, for the *Florida East Coast* case involved the partial suspension of Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, to permit effective self-help by a carrier (384 U.S. at 245-46), and not the limitation of a carrier's self-help remedies.

and primary activities, and because Congress has given no clear standards with which to judge this division, federal courts are incompetent to attempt to draw any line between primary and secondary activity. 394 U.S. at 392-93.

If petitioners' and *amicus* NRLC's views were adopted and federal courts were authorized to decide which form of self-help was permissible as "primary" and which form was enjoinable as "secondary," federal courts could once again bring to bear their own socio-economic views of what conduct is proper and what is not. Such an extensive intrusion of the federal courts in developing the public policy of permissible forms of self-help in a labor dispute, respondents submit, is exactly what Congress sought to prevent by enacting Section 4 of the Norris-LaGuardia Act. Since Congress has not provided in the Railway Labor Act (envisioned by petitioners and *amici*) a clear ban on secondary activity with specific standards, it would be improper, respondents respectfully submit, for this Court to authorize federal courts to enter into an area from which Congress has declared they must leave and never return.

B. Peaceful Secondary Pressure In A Pure Rail Labor Dispute May Not Be Enjoined Because It Is Protected Unregulated Activity

Construing the Railway Labor Act's silence as to what forms of self-help are available in this case as supporting their view of the Act, petitioners assert that the Act's structure, its purposes and the status of secondary pressure in 1926 all indicate that Congress intended to prohibit secondary pressure when it enacted the Railway Labor Act in 1926. Respondents disagree, for what petitioners fail to appreciate is that the Railway Labor Act was an agreement between rail labor and management, adopted by Congress, to provide procedures to resolve disputes by conference, negotiation, mediation and voluntary arbitration so that self-help by either side would be unnecessary. The Act did not address the forms of self-

help which were available to the parties once the Act's processes proved unsuccessful, because the Act was negotiated on the premise that the right to engage in self-help existed, but that this right should be held in abeyance while the Act's procedures were being utilized in an effort to resolve the dispute. *Hearings on H.R. 7180 before House Committee on Interstate and Foreign Commerce* [hereinafter, "*House Hearings*"], 69th Cong., 1st Sess. at 92-93 (1926);[27] *see also, Id.* at 17 (Mr. Richberg explained that one of the purposes of an emergency board was that the public might be informed as to who was in the wrong "if these differences went on to conflict"). Since the Railway Labor Act did not create the right to self-help, there was no need for that law to define its parameters.

To argue, as petitioners do, that the Act went further and adopted, as an essential feature of the legislation, this Court's construction of Section 20 of the Clayton Act in the *Duplex* case[28] is to strain credulity, for it

[27] That the Railway Labor Act must be viewed as merely suspending temporarily the right to self-help is clear from the testimony of rail labor's chief spokesman, Mr. Donald R. Richberg, when he explained to Congress the intent of the agreement:

> Now, then, when you come to the creation of an emergency board [and its status quo requirement] . . . I want to say—and no one can deny this—that in the history of industrial controversies in this country this is the only case where the employees of an entire industry, properly represented, have come before Congress with the accompanying agreements of employers of that industry, have asked that the law be written to preserve peace in the industry, and at the same time have expressed their willingness to have written into that law that during the period of an unsettled controversy, when investigation and report is being made thereon, the conditions shall remain unchanged [i.e., no strikes or unilateral changes].

House Hearings at 93.

[28] Petitioners refer to various statements of Mr. Richberg to argue that the 1926 Act was intended by the parties to preserve the existing law of conspiracy. Pet. Brief at 13 n.12. That reliance is misplaced, for Mr. Richberg was referring to a provision proposed by a business representative that would have made a strike in violation of Section 10's status quo period an unlawful act.

is absurd to allege that rail labor would have knowingly acquiesed in such a constriction of its available self-help remedies when it was, along with all organized labor, actively seeking to have Congress overrule the *Duplex* case and similar improvident injunction precedents. *See*, 75 Cong. Rec. 4618-20 (1932) (Remarks of Sen. Blaine); *Id.* at 5499, col. 2 (Remarks of Rep. Beck); *House Hearings* at 92 (Testimony of D. R. Richberg speaking of "club of the law that he [*i.e.*, employee] feels has been unjustly invoked by the Government"). Moreover, that argument on petitioners' part ignores the fact that all forms of peaceful picketing and sympathy strikes involve fundamental and constitutionally protected rights which should not be viewed as being restrained absent a clear congressional intent to the contrary. *E.g., AFL v. Swing*, 312 U.S. 321 (1941); *RF&P* case, *supra*, 795 F.2d at 115; *accord, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Contrary to petitioners' and *amicus* NRLC's assertions, it was not generally conceded in 1926 that secondary pressure tactics in the rail industry were unlawful, for even though such conduct was often enjoined, rail labor and all of labor along with numerous supporters in Congress and elsewhere, were asserting that working men had the right to engage in such concerted activity for their mutual aid and protection. *See*, 75 Cong. Rec. 4618-20 (1932) (Remarks of Sen. Blaine). Even before the rail industry was heavily unionized by the end of World War I,[29] rail strikes frequently involved extensive sec-

[29] "Eighty percent of eligible train service employees and 20 percent of other railway workers were union members just before the period of Federal control [beginning in 1917]. In 1920, at the end of public operations, these figures had increased to 90 percent for train service workers and 80 for the others." L. A. Lecht, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION at 32 (Columbia Univ. Press. 1955) (footnote omitted).

ondary activities which took many forms, including concerted refusals to handle cars destined to or coming from the struck carrier,[30] and sympathy strikes by employees of other rail carriers.[31] While these actions were frequently enjoined, as were massive rail strikes in general, [32] it was recognized by the aftermath of the American Railway Union's Pullman strike in 1894 that rail strikes, even if initially caused by a localized event, had the tendency to become general rail strikes because of the high degree of cooperation and dependence among employees and railroads in the industry.[33] Indeed, the cooperation and high-dependence on each other was not limited to rail labor, but rather, originated with the railroads themselves.[34]

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[30] Secondary boycotts in the rail industry may be traced to "Rule 12" of the Brotherhood of Locomotive Engineers which was adopted in 1890 and required brotherhood members to refuse to handle cars of a struck carrier. *See, Toledo, A.A.&N.M.Ry. v. Pennylvania Comm., supra,* 54 Fed. at 733. Such boycotts were used by all crafts and industries by the early 1900s. S. Stromquist, A GENERATION OF BOOMERS at 48-99 (Univ. of Illinois Press 1986) (Galley proofs).

[31] S. Stromquist, A GENERATION OF BOOMERS, *supra* note 30 at 269. Mr. Stromquist also describes as one form of sympathy action the high incident of "Q. colic," a "mysterious illness" which employees of the non-struck railroads developed during a strike against the "Q"—*i.e.*, the Chicago, Burlington & Quincy R.R.—in 1888. *Id.* at 213.

[32] *See,* G. Eggert, *supra,* at 238-39.

[33] For example, the "Switchmen's Strike of 1920" began when a yard conductor, who was also a union officer, was dismissed and about 700 members of the Chicago Yardmen's Association left their jobs in sympathy on various roads in Chicago. H. D. Wolf, THE RAILROAD BOARD at 103 (Univ. of Chicago Press. 1927).

[34] Railroads have for a long time engaged in cooperative actions in connection wtih labor relations; these actions included, before 1900, strike insurance plans, general manager associations, blacklisting of employees for striking, agreements on wage and rule changes, and plans to provide replacement employees for each other in the event of strikes. S. Stromquist, A GENERATION OF BOOMERS, *supra*, note 30 at 229-66. With the exception of blacklisting, these forms of cooperation continue today.

While, as explained above at pages 17-20, Congress unsuccessfully sought in 1914 to immunize secondary acitvity by enacting the Clayton Act, it is clear that by 1926 when Congress adopted the Railway Labor Act, the pressure to reassert the original purpose of the Clayton Act was mounting. By 1932 that pressure had reached such a level that Congress enacted the Norris-LaGuardia Act which this Court has held "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." *United States v. Hutcheson, supra,* 312 U.S. at 236; *see, H. A. Artists & Assoc., Inc. v. Actors Equity Assn.,* 451 U.S. 704, 715 (1981). That Act clearly immunized peaceful secondary pressure in any labor dispute which was subject to federal regulation. *National Woodwork Manufacturers Assoc. v. NLRB, supra,* 386 U.S. at 622-23. Thus, when the Railway Labor Act was modified in 1934 and Sections 1 through 6 were reenacted, the law of self-help was clear and secondary pressure was permissible. Respondents submit, it is Congress' intent in 1934 which governs here.

Ignoring the manner in which congressional regulation of injunctions to restrain permissible forms of self-help developed separately from federal regulation of the collective bargaining process itself, petitioners and *amicus* NRLC assert that Congress' intent to prohibit secondary pressure in the rail industry is evidenced by the fact that for sixty (60) years before the BMWE-MEC/PT strikes, it was recognized by the industry that secondary pressure was not available in rail labor disputes. *E.g.*, Pet. Brief at 24; *Amicus* NRLC Brief at 27. That argument, respondents respectfully submit, is without merit factually.

What petitioners and *amicus* fail to take into account is that between 1926 and 1947 when the Taft-Hartley

Act was enacted,[35] the Railway Labor Act was extremely successful in preventing rail strikes. Between 1926 when the Act was initially enacted and 1932 when the Norris-LaGuardia Act was enacted, there were only two strikes in the rail industry. 6th Annual Report of U.S. Board of Mediation at 1 (1932). One of those strikes was of a few hours duration in 1928 in New York City when Railway Express drivers engaged in an unauthorized strike. *Id.* The second began in 1929 when employees on the Toledo, Peoria & Western Railroad struck; that strike, the Board of Mediation noted, "did not interrupt interstate commerce." 4th Annual Report of U.S. Board of Mediation at 1 (1930). A similar record, albeit not as dramatic, was achieved by the Act between 1932 and 1947. *E.g.*, 8th Annual Report of National Mediation Board at 1-2 (1941). Due to this low level of strike activity, it is virtually impossible to allege that the industry clearly believed sympathy strikes were unlawful.[36]

[35] Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947).

[36] In fact, the available evidence indicates that sympathy strikes were accepted as a potential aspect of rail strikes in the early years of that Act, for during this period, the mediation boards routinely recommended the creation of emergency boards whenever a strike date had been set at the unsuccessful conclusion of the Act's non-emergency board processes for resolving major disputes, even if the carrier involved was a small switching or short line. *E.g.*, Emergency Board No. 42, created September 23, 1946 (Utah Idaho Central R.R.—121 mile line); Emergency Board No. 60, created April 10, 1948 (Aliquippa & Southern R.R.—industrial switching railroad). The reason for the boards' policies in so freely recommending the creation of emergency boards, respondents respectfully submit, may be seen from the following quotation from the 1st Annual Report of the NMB at 30 (1935):

> One of these cases [in which board intervened] involved a threatened strike of train-service employees on the Pacific Electric Railway, a subsidiary of the Southern Pacific lines. There were some threats also of sympathetic actions by employees on other railroads in southern California.

Relying upon the structure of the Act, petitioners and *amicus* NRLC seek to read into the Act a ban on secondary picketing by asserting that the Act was intended to deal comprehensively with all railway labor disputes, and that since the Act deals solely with disputes between a carrier and its employees, the statute cannot be read as contemplating or condoning secondary activity. Respondents respectfully submit that petitioners' and *amicus*' arguments are without merit, for those arguments ignore the fact that the right to engage in secondary activity in this case does not arise from a dispute between the BMWE and petitioners. Rather, secondary activity is an integral part of the BMWE's "self-help arsenal" for use against MEC and PT. *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 304. Thus, it is immaterial and, indeed, entirely logical, that the Railway Labor Act does not provide a mechanism to allow petitioners to require appellee BMWE to bargain with them over whether the union can resort to secondary pressure in its disputes with MEC/PT. What is important is that the Act provides a mechanism to resolve the primary dispute and, if successful, that process will prevent secondary activity and interruptions to commerce.[37]

Finally, petitioners' belief that secondary activity is prohibited by the Railway Labor Act is directly contrary

[37] *Amicus* NLRC relies on Section 2 First of the Act to assert that respondent BMWE owes a duty to all other carriers on which it represents employees not to engage in secondary pressure against them. There are, however, two problems with this argument. First, Section 2 First requires rail labor to exert every reasonable effort to resolve disputes with a carrier over a "dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. As explained above, respondents secondary activity does not arise out of a dispute with petitioners within the meaning of Section 2 First. And second, *amicus*' argument proves too much for it would forbid all forms of sympathy strikes, including sympathy strikes with the primary employer by other employees of that carrier. Neither petitioners nor *amicus*, by concentrating on secondary activities, have, or could validly, raise such an argument in view of the extensive history of such sympathy strikes in this industry.

to this Court's conclusion in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, that the Railway Labor Act does not prohibit any form of peaceful picketing, whether characterized as primary or secondary. In its *Jacksonville Terminal* decision, the Court addressed the question of whether a State may prohibit a rail union from engaging in secondary activity and it answered that question in the negative because it concluded that such conduct was protected by the Railway Labor Act. That conclusion controls and rejects both petitioners' and *amicus*' efforts to outlaw secondary picketing.

Jacksonville Terminal arose out of the picketing of the Jacksonville Terminal in the same strike which was involved in the Fifth Circuit's *Atlantic Coast Line* case, but unlike the factual situation presented to the Fifth Circuit, the *Jacksonville Terminal* case involved picketing of solely the Terminal's facility.[38] That picketing was enjoined by a Florida state court because it found that it was a "secondary boycott illegal under state law. . . ." 394 U.S. at 374. After holding that state law was preempted by the Railway Labor Act, this Court drew upon labor policies evidenced by the National Labor Relations Act and concluded that the right of self-help protected by the Railway Labor Act "includes peaceful 'primary' strikes and nonviolent picketing in support thereof, . . . and that it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited. . . ." 394 U.S. at 390 (emphasis in original). At that point, the Court then considered:

> [W]hether, under the present framework of congressional legislation, this Court should undertake precisely to mark out which of the petitioners' picketing activities at respondent's premises are federally protected, and therefore immune from state interference, and which of them are subject to prohibition by the State.

[38] The *Atlantic Coast Line* case also involved picketing of a separate yard of the Atlantic Coast Line. 362 F.2d at 651.

394 U.S. at 391. The Court answered that question by stating: "We believe that such a course would be a wholly inappropriate one for us to take in the absence of a much clearer manifestation of congressional policy than is to be found in existing laws." *Id.*

In support of that conclusion, the Court observed:

> [E]ven on the unjustified hypothesis that all secondary conduct is necessarily wrongful, we would lack meaningful standards for separating primary from secondary activities. Nor do the terms of the Railway Labor Act offer assistance. As we have indicated, the Act is wholly inexplicit as to the scope of allowable self-help.

394 U.S. at 391. Referring to that section of its opinion in which it noted that the facts of the case before it may actually constitute permissible activity under the standards legislated in the National Labor Relations Act (*see* 394 U.S. at 388-90), the court observed that Congress had not given any administrative agency "even colorable authority to perform" the task of adopting National Labor Relations Act principles to rail labor disputes, and it opined that: "The very complexity of the distinctions examined [earlier] . . ., if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task ourselves." 394 U.S. at 392. That conclusion was buttressed, this Court believed, by the fact that the rail industry was unique and that, if it or the lower federal courts intruded into that world in order to outline the bounds of permissible self-help, the courts might upset the balance of power which Congress, and not the courts, has the right to strike. *Id.*

As the Court then concluded (394 U.S. at 392-93 (footnote omitted; emphasis in original):

> In short, we have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory

> judicial solution to the problem at hand. However, we conclude that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription. . . . Any other solution—apart from the rejected one of holding that *no* conduct is protected—would involve the courts once again in a venture for which they are institutionally unsuited.

More than 17 years have passed since that decision was rendered and Congress has not seen fit to provide the standards which the Court found to be lacking. That silence, respondent BMWE respectfully submits, must be viewed as congressional acquiescence to the view that the Act does not prohibit secondary picketing.

Petitioners attempt to avoid the logical consequences of *Jacksonville Terminal* by asserting that the decision should be construed as holding only that state law is preempted by the Railway Labor Act, and not that secondary activity is permissible under the Railway Labor Act. Pet. Brief at 37. That argument is without merit, for as the Seventh Circuit observed in this case, such a narrow reading of *Jacksonville Terminal* is inconsistent with the type of preemption which this Court concluded was effected by the Railway Labor Act. Pet. App. at 16a-17a. In *Jacksonville Terminal*, this Court did not rely upon the preemption rule expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), to conclude that state court jurisdiction over this issue was preempted. Indeed, the *Jacksonville Terminal* Court concluded that the Florida state courts had the subject matter jurisdiction to consider the Terminal's complaint, but that those courts had to apply federal law because Congress had preempted this area of law. 394 U.S. at 375-82.

The Court then went further and examined that federal law to determine if secondary activity was proscribed. As the court of appeals observed, the *Jacksonville Terminal* Court held that all forms of peaceful secondary picketing are lawful methods of self-help in a Railway Labor Act dispute which "Congress meant to leave unregulated . . . ." Pet. App. at 16a. Consequently, *Jacksonville Terminal* is an example of preemption of substantive law by Congress' deliberately leaving an area of law unregulated.

When that conclusion is coupled with the impact of the Norris-LaGuardia Act on Section 20 of the Clayton Act, it becomes clear that secondary activity in a rail labor dispute is protected, not only from state regulation, but also from federal non-labor regulation. Since Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act immunize secondary pressure from the taint of being unlawful under federal law, the conclusion which is inescapable is that secondary pressure in a rail labor dispute is protected, unregulated activity. As this Court has observed recently:

> . . . " 'Congress has been rather specific when it has come to outlaw particular economic weapons,' " [*Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 143 (1976)] . . . quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1966), and that congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' " *Machinists*, 427 U.S. at 146, quoting *Teamsters v. Morton*, 377 U.S. 252, 258-59 (1964).

Golden State Transit Corp. v. City of Los Angeles, supra, 89 L.E.2d at 623-24. Here, by not prohibiting secondary picketing in rail labor disputes, Congress must be presumed to have deliberately left such activity as part of labor's arsenal of economic self-help weapons, available

once the right to use self-help is no longer restrained by the Railway Labor Act.

C. Petitioners' View Of The Railway Labor Act Ignores The Structure Of The Act And Would Create Unnecessary Anomalies

While petitioners assert that rail labor's and the Seventh Circuit's view of the Railway Labor Act ignores the structure of the Act and creates absurd results, it is actually petitioners' view of the Act which creates these problems. What petitioners fail to recognize is that the sole reason they may legitimately claim a right to an injunction in this case is to protect the public's right to uninterrupted rail service. However, the Railway Labor Act itself protects that right by providing in Section 10 of the Act that if, in the "judgment of the Mediation Board, [an unresolved dispute should] threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute." 45 U.S.C. § 160. As this case shows, the creation of such an Emergency Board stops the self-help which lead to its creation. Moreover, if at the conclusion of the Emergency Board's status quo period, the underlying dispute still remains unresolved, Congress always has the power to deal with whatever public emergency may be created. *E.g.*, *Wilson v. New*, 243 U.S. 332 (1917). This case, again, is an excellent example of that fact. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1986). In short, whatever public interests are at risk by secondary pressure are already protected both by Section 10 of the Railway Labor Act and by Congress' power to regulate interstate commerce.

This case, however, is also a prime example of the manner in which federal court involvement in rail labor disputes can upset the careful balance of public and

private rights effected by the Railway Labor Act. Here, the President stated when he created the Emergency Board in this case that he waited a substantial period of time in creating that board after being informed of its need because federal court injunctions had delayed respondent BMWE's efforts to picket connecting carriers. White House Press Release of May 16, 1986, reproduced as App. B to Respondents Brief In Support of Petition in this case.[39] In other words, if the federal courts had not intervened, the MEC/PT strike, with its impact on New England and thousands of employees, would have ended at least one month earlier. Thus, while petitioners' parochial interests were aided by their view of the Railway Labor Act, the public's interests were not.

Another glaring problem with petitioners' view of the Railway Labor Act, is that under their view of the law, railroads are the only industry which may appeal to the federal courts for injunctions to enjoin secondary picketing. Even though the National Labor Relations Act, as modified by Section 8(b)(4) of that Act, clearly proscribes forms of pressure against apparent neutrals, only the National Labor Relations Board, and not private parties, may petition a district court to enjoin conduct proscribed by that provision. *See, Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 718. Thus, in seeking to read by implication a ban against secondary picketing into the Railway Labor Act, petitioners are also seeking to become the only industry which is totally free of the strictures of the Norris-LaGuardia Act.

Finally, *amicus* NRLC's arguments that rail labor's views of the right to engage in secondary pressure will alter the balance of bargaining power in the industry may be correct. Rather than creating a new balance,

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[39] The NMB recommended the appointment of an Emergency Board between April 11 and 14, 1986. *RLEA v. B&M, supra*, 639 F. Supp. at 1098.

respondents respectfully submit that its view of permissible self-help will restore the balance that existed in the early years of the Act—years when a respect for each side's bargaining power resulted in virtually no strikes of any consequence. But even if rail labor's view of the Act creates a totally new balance, the question posed by petitioners and *amicus* as to the validity of this balance is for Congress, and not the courts, to answer.

CONCLUSION

For the reasons set forth below, respondents BMWE, *et al.*, respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Statutes Relied Upon

1. Clayton Anti-Trust Act

   A. Section 20, 29 U.S.C. § 52

2. Norris-LaGuardia Act

   A. Section 4, 29 U.S.C. § 104

   B. Section 13, 29 U.S.C. § 113

1. Clayton Anti-Trust Act, Section 20, 29 U.S.C. § 52

A. **Section 20.** That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

2. Norris-LaGuardia Act, Section 4, 29 U.S.C. § 104

A. **Section 4.** No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 13, 29 U.S.C. § 113

B. **Section 13.** When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or

concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any part of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

APPENDIX B

Side-By-Side Comparison of Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 and the Second Paragraph of Section 20 of the Clayton Act, 29 U.S.C. § 52

Norris-LaGuardia Act, Section 4, 29 U.S.C. § 104	Clayton Anti-Trust Act, Section 20, 29 U.S.C. § 52
Sec. 4 No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert any of the following acts:	And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communcating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.
(a) Ceasing or refusing to perform any work or to remain in any relation of employment;	
(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;	
(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;	
(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;	
(e) Giving publicity to the existence of, or the facts in-	

volved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.